

MALAYSIAN FRENCH BANK BHD. & ORS.

a

v.

JOO SENG RUBBER CO. SDN. BHD. (IN RECEIVERSHIP) & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. S7-24-2166-89]
27 AUGUST 1991

b

BANKING: *Foreign bank registered locally - Subsidiary of French holding bank - Reconstruction scheme by holding bank - Subsidiary dissolved - Business transferred to new entity - Whether new entity had valid banking license - Name of new entity not published in Gazette - Whether publication was condition precedent to issue of banking license - Directory or mandatory - Bank Negara advised of name change - Recommendation to Minister of Finance - Necessary documents furnished - Memorandum and articles of association - Objects of company - Wide enough to include banking - No change in constitution or set-up - Same entities - No prohibition in legislature against corporation applying for banking license - Banking Act 1973, ss. 2, 3(1), (a), (b), (c), (3), (4), 5, 6, 9(1)(a), 13, 24 - Companies Act 1965, ss. 22(1), (2), 332(1), 334(1), 340(5).*

c

d

Banque De L'Indochine, a French company, set up a branch in Kuala Lumpur, also called *Banque De L'Indochine* (the original BDL) which was registered as a foreign company and which was issued with a banking licence on 15 April 1965.

On 11 March 1971, the first respondent (J) issued a debenture charging its undertakings, property and assets by way of security in favour of a bank *Banque De L'Indochine*, (the original BDL) to secure the repayment of loans granted by the original BDL. On the same date, J also executed a legal charge in respect of property in Ipoh in favour of original BDL. Subsequently further land charges were executed in favour of original BDL, on 8 October 1973 and on 22 December 1980, the latter being to secure payment of monies advanced by *Banque Indosuez*. Among the assets and properties charged were shares registered in J's name in various companies.

e

f

In 1974 the head office in France had adopted a reconstruction scheme whereby all the banking business carried on by it in all its branches worldwide was dissolved. The original BDL notified the Registrar of Companies (ROC) of the dissolution. On the same date of the dissolution, the banking business of the original BDL was transferred to *Societe De L'Indochine* (SDL). Also on this date, SDL changed its name to *Banque De L'Indochine* (the new BDL). Bank Negara approved of the reconstruction and issued a banking licence in the name of the new BDL authorising it to carry on banking business from 1 June 1974. The original BDL was requested to return the licence issued to it earlier on.

g

On 22 May 1974, J executed an agreement with SDL whereby SDL agreed to grant to J all facilities previously enjoyed by J from the original BDL; the existing security was transferred from the original BDL to SDL.

h

The original BDL also executed a transfer of debenture with SDL on 31 May 1974 transferring to SDL the debenture and the land charges, in consideration of the new BDL assuming all rights and liabilities specified in the debenture.

On 2 July 1975, the ROC issued a certificate of change of name of the SDL to the new BDL. On 15 November 1975, this name was changed to *Banque de L'Indochine Et De Suez (Banque Indosuez)* which entity was also issued a banking licence. On 10 December 1982, pursuant

i

a to an agreement between *Banque Indosuez* and MFBB, the transferee MFBB acquired the assets and liabilities of the *Banque Indosuez*, which included the immovable properties of the transferor, *Banque Indosuez*. J agreed to transfer to MFBB the debenture to MFBB as security for advances made to J by MFBB.

b On 1 April 1985, the original BDL transferred to the first applicant (MFBB) the debenture and the land charges. J defaulted in their repayment and MFBB applied for orders for the sale of the said lands. In their defence, J contended that the transfer of the debenture to MFBB on 1 April 1985 was illegal and void. J contended, *inter alia*, that:

- c** 1. The transfer of the debenture dated 31 May 1974 from the original BDL to SDL was null and void as on that date, SDL was not in possession of a valid licence and that any licence issued by the Ministry through the Central Bank pursuant to s. 24 of the Banking Act 1973 (the 1973 Act) was an invalid licence.
- d** 2. Both Gazette notifications 7 March 1974 and 31 March 1975 contained the original BDL's name as a bank licenced on 15 April 1965. Therefore the banking licence issued by Minister of Finance on 22 May 1974 was a replacement or extension of the licence issued to the original BDL. Since the 1974 licence of the new BDL was not published at all, that licence was null and void for s. 13 of the 1973 Act made it mandatory for the Central Bank to publish a list of banks to which licences had been issued.
- e** 3. Since the new BDL came into existence only after 31 May 1974, the BDL named in the 1974 licence was meant for the original BDL. In sending the 1974 licence to BDL, Bank Negara addressed it to the Pengurus, *Banque De L'Indochine*, 44, Jalan Pudu, Kuala Lumpur and not to the SDL as per letter dated 28 September 1990.
- f** 4. SDL had failed to make an application to Bank Negara under s. 3(2) of the 1973 Act for a banking licence. The Minister of Finance was wrong to issue the 1974 licence to the new BDL.
- g** 5. The memorandum and articles of association of SDL did not permit SDL to do banking business and therefore did not comply with ss. 3(2), (3) & (4) of the 1973 Act.
- h** 6. Since the ROC did not register the change of name of SDL to the new BDL until 2 July 1975 the Minister in issuing the bank licence to the new BDL on 22 May 1974 was in violation of s. 22(1) and (2) of the Companies Act 1965. In issuing the said banking licence the Minister of Finance violated the provisions of the Gazette Notification No. 1484 of 14 April 1966 which empowered only the then Minister of Commerce and Trade to direct the ROC not to register *inter alia* any company that carried with it the name bearing the words 'Bank', 'Banker', etc. without the approval of the said Minister.
- i** 7. As *Banque Indosuez* failed to comply with s. 3(2) of the Banking Act 1973, the banking licence issued to it on 1 October 1975 was null and void.
8. As *Banque Indosuez* had surrendered its banking licence on 1 October 1982 it must have ceased to carry on banking business. J's Counsel therefore went on to argue that from 1 October 1982 till 1 April 1985 (a period of 30 months) *Banque Indosuez* was holding the banking securities of its customers with out a banking licence while its associate company MFBB was doing business with the same customers.
9. MFBB obtained a banking licence and commenced banking business on 1 October 1982 - however it was only on 10 December 1982 that it executed an agreement with *Banque Indosuez* - a lapse of 70 days. Hence MFBB was doing banking business on 1 October 1982 with all the customers of *Banque Indosuez* without a valid licence and legal

capacity. It must follow therefore that MFBB could not have legally obtained a transfer of the debenture because of the above illegality, and likewise the amount owing by J was void and unrecoverable because of the illegality.

Held:

[1] There was a mistake in not publishing the date of the issue of the licence to the new BDL. Bearing in mind that in spite of the request made to the old BDL to return its old licence for cancellation, it failed to do so. The 1965 licence issued to it was still on record. The 1974 licence was issued to a bank that carried the same name. It was therefore understandable that the officer of Bank Negara who caused the publications to be made mistakenly cited the 1965 licence instead of the 1974 licence.

[2] The publication of the list as provided in s. 13 of the 1973 Act is not a condition precedent to the issue of a banking licence under s. 3 of the 1973 Act - it is only a means to let the public know the names of the bank to whom licences have been issued. Furthermore there is no penalty imposed by s. 13 to penalise anyone who failed to cause the list to be published. Banks have no control over those who are enjoined by the said s. 13 to carry out the publication provided therein. Any omission or error in the publication will cause injustice not to the general public but only to the bank concerned. Therefore the said s. 13 is directory and not mandatory.

[3] Bearing in mind that the old BDL had informed Bank Negara that the said *Banque* would be dissolved on 31 May 1974, that its banking business would be taken over by SDL and that SDL would change its name to the new BDL and operate the banking business under this name, it is absurd to suggest that the banking licence issued by the Minister of Finance on 22 May 1974 was meant to be a replacement or an extension of the 1965 banking licence of the original BDL which would cease to exist as at 31 May 1974 and not for SDL which would change its name to BDL and would operate the banking business under that name as at 1 June 1974.

[4] In the circumstances it cannot be denied that the 1974 banking licence was sent to the Pengurus of the new BDL at no. 44, Jalan Pudu, Kuala Lumpur which was the address of the said new *Banque* although it was also at that same address that the original *Banque* was operating its business before its dissolution.

[5] As SDL had informed Bank Negara that it would be changing its name to the new BDL and operate its banking business under that name, Bank Negara quite rightly said that "no licence had been issued in the name of SDL" because SDL would cease to exist after 31 May 1974 and it would operate its banking business under the new name of BDL.

[6] As the 1965 licence was not surrendered to Bank Negara until 30 September 1976, that licence as far as Bank Negara was concerned would remain in its record as it had not yet been cancelled. It is for this reason that the writer of Bank Negara by letter of 18 August 1990 said that the 1965 licence "was valid until it was surrendered on 30 September 1976 (that is, when the bank changed its name etc.)". When the writer of the Bank Negara letter said the bank changed its name, he was referring to the new BDL and not the original BDL which no longer existed. That being the case the only conclusion that one can logically arrive at is that the new BDL changed its name to *Bank Indosuez* on 30 September 1974.

[7] It is highly improbable that Bank Negara would recommend to the Minister of Finance to issue a banking licence to the new BDL when SDL had not made a proper application. Bank Negara had by letter dated 28 September 1970 categorically confirmed, *inter alia*, that the new BDL as well as *Banque Indosuez* and MFBB had and has at all times valid licences

a

b

c

d

e

f

g

h

i

- a* apparently under the provisions of s. 3 of the 1973 Act. Bank Negara would not have made such an unqualified statement had there been a failure on the part of any of the banks in question to properly apply for a banking licence.
- b* [8] The SDL took over the banking business of the original BDL under a reconstruction scheme for which approval of the Minister of Finance must be obtained pursuant to s. 24 of the Banking Act 1973. The said Minister would only give his approval upon the recommendation of Bank Negara. To obtain the approval SDL would certainly have had to furnish Bank Negara with all necessary documents which must include the instrument under which it was incorporated, latest audit account and balance sheet and such other information as the Minister might require. Therefore, SDL had complied with the provisions of subsection (2) of s. 3 of the 1973 Act not once but twice.
- c* [9] In the Certificate of Registration of Foreign Company issued by the ROC to SDL it was stated that SDL had duly complied with the provisions of s. 332(1) of the Companies Act 1965 (the 1965 Act). Bearing in mind that SDL applied for registration on June 1974 and was able to furnish the ROC with all the necessary documents as stipulated in s. 332(1) of the 1965 Act, it is highly incredible that in obtaining a banking licence which was more important, it could have failed to comply with s. 3(2) of the 1973 Act where it had only to furnish Bank
- d* Negara with just two documents namely a copy of the instrument under which it was incorporated and a copy of the latest audited balance sheet.
- [10] The articles of association of SDL clearly shows the object of SDL. Such a wide object must include banking business.
- e* [11] Section 22(1) and (2) of the 1965 Act and *Gazette* notification no. 1484 of 1966 merely empowered the Minister of Commerce and Trade to disallow the ROC to register a company having the name bearing the words "Bank", "Banker" etc. The two subsections and the *Gazette* notification did not empower the said Minister to forbid any corporation which did not have a banking licence to use the word bank and to carry on banking business. The power to do so is conferred on the Minister of Finance pursuant to s. 9(1)(a) of the Banking Act 1973. In issuing the banking licence bearing the name of the new BDL to SDL it is clear
- f* the prohibition under s. 9(1)(a) would no longer apply. That being so the Minister of Finance had not in any way violated any provisions of the Companies Act 1965 or the Banking Act 1973 for he had the power under s. 3(1) of the latter Act to issue a banking licence to SDL to carry out banking business. J was at any rate estopped from raising this issue since they had dealt with the new BDL to get loans from them on the strength of the debenture.
- g* [12] The reasons as stated earlier in relation to the rejection of J's contention that the banking licence issued to SDL was invalid apply *mutatis mutandis* in the rejection of MFBB's contention against the banking licence issued to *Banque Indosuez*. Moreover it was through the change of name on the part of the new BDL to *Banque Indosuez* that the latter *Banque* was created. There was no change of the constitution or the financial set-up of *Banque Indosuez* in the process of the alteration of name. Hence the entity of both *Banque* was the same and s. 24 of the Banking Act 1973 would not apply.
- h*
- i* [13] *Banque Indosuez* did not even take any security on or after it had surrendered its banking licence - it merely retained the securities of its customers (including the debenture created by J) in anticipation of transferring them to the MFBB. To say that the *Banque Indosuez* was doing banking business by proxy through the MFBB is preposterous for MFBB had and still has a valid banking licence and it was carrying out banking business for its own benefits.

[14] There is no provision in the Banking Act 1973 prohibiting any corporation from applying for a banking licence. The agreement to take over the assets and liabilities of BDL was a private arrangement between BDL and MFBB. It is true that the purpose of establishing MFBB was to take over the banking business of BDL but that could not prevent MFBB from applying for a banking licence on its own right. As there is no evidence to show that MFBB had infringed ss. 5 and 6 of the 1973 Act or that it was incapable of operating the bank in compliance with the law, it is not open for J to question the discretion of the Finance Minister to issue a banking licence to MFBB. The banking licence issued to MFBB was and still is a valid licence as confirmed by the letter of Bank Negara dated 28 September 1990.

[15] Having on their own volition applied for and accepted loans from MFBB, it is not open for J to complain that MFBB had no legal capacity to carry on banking business. That being so, the debenture was properly and validly transferred by BDL to MFBB and the loans to J are certainly recoverable by MFBB.

[16] Furthermore, in an action instituted by MFBB against J and five others, judgment had already been obtained against J. That judgment precluded J from alleging that the loans taken by them from MFBB are not recoverable. The appointment of receivers and managers for J held to be perfectly legitimate and legal by virtue of the debenture created by J on 11 March 1971.

[Applicant's orders granted.]

Cases referred to:

State of Punjab v. Satya Pal AIR [1969] SC 903 (**fol**)
Amalgamated Property Co. v. Texas Bank [1981] 2 WLR 554 (**cit**)
Koh Kim Chai v. Asia Commercial Banking Corporation Ltd. [1984] 1 CLJ (Rep) 18 (**dist**)

Legislation referred to:

Banking Act 1973, ss. 2, 3(2), 9(1)(a), 13, 24
 Companies Act 1965, ss. 22(1), (2), 332(1), 334(1), 340(5)
 Companies Ordinance 1940, s. 301(1)

For the applicants - D.P. Naban; M/s. Skrine & Co.

For the 1st respondent - Pathmanathan; M/s. Yusof Lee Pathma & Marbeck

JUDGMENT

Lim Beng Choon J:

In an application made by way of this originating summons filed on 17 October 1989 the 1st applicant namely the Malaysian French Bank Berhad is asking for *inter alia* the following orders, which I quote:

- (a) that the receivers and the managers (who are named as 2nd, 3rd and 4th applicants) of Joo Seng Rubber Co. Sdn. Bhd. (who is named as the 1st respondent) be at liberty to sell the abovesaid lands and/or parts thereof and securities registered in the name of Joo Seng Rubber Co. Sdn. Bhd. in accordance with the terms of the debenture dated 11 March 1971; (Words in parenthesis are mine).
- (b) that the 1st applicant Malaysian French Bank Berhad, and/or the receivers and managers of Joo Seng Co. Sdn. Bhd. be entitled to execute on behalf of the said Joo Seng Rubber Co. Sdn. Bhd. any transfers in respect of the said lands which the receivers and managers may present;
- (c) that any such transfers presented to the Registrar shall have stated therein the names

- a* of the transferees and the consideration;
- (d) that any transfers of the said lands duly executed in the manner described in para.
- (b) above be registered by the Registrar of Titles in favour of the transferees named therein.
- The grounds relied on by the applicants as can be seen from the affidavit dated 17 October 1989 of their application can be summarised as follows.
- b* By a debenture made on 11 March 1971 (the debenture) between the 1st respondent and *Banque De L'Indochine*, the 1st respondent charged its undertaking, property and assets both present and future by way of security in favour of *Banque De L'Indochine* to secure payment to the *Banque De L'Indochine* of the money obligations and liabilities mentioned in the debenture. The debenture was duly registered pursuant to the provisions of the
- c* Companies Act 1965. The provisions of the debenture which are material to the present case are *inter alia* as follows and I quote:
- (a) the principal monies thereby secured shall become immediately repayable on demand being made by *Banque De L'Indochine*;
- d* (b) *Banque De L'Indochine* may, at any time after the principal monies thereby secured shall have become payable, appoint any person or persons to be receivers and managers of the property and assets thereby charged;
- (c) such receivers and managers appointed as aforesaid shall be the agents of the company (namely the 1st respondent) and shall have power *inter alia*:
- (i) to take possession of and get in the property and assets of the company thereby and/or;
- e* (ii) to sell or concur in selling any of the properties and assets thereby charged. And in exercising the power of sale thereby conferred, the receivers and managers may sell at such time and in such manner and at such price as they think fit, and in exercising such discretion they may have regard to the views and desires of *Banque De L'Indochine* and shall not be accountable for any loss or damage which may be alleged to have been suffered by the company by reason of their discretion;
- f* (iii) to do all such other acts and things as may be considered to be incidental or conducive to any of the matters or powers therein and which they may lawfully do as agent of the company and/or;
- (iv) to do any other act or thing which a receiver and manager appointed by the Court is permitted to do.
- g* (d) The net proceeds of any sale shall be applied by the receivers and managers:
- Firstly in payment of all costs, charges and expenses of and incidental to the appointment of the receivers and managers or the exercises by them of all or any powers therein including reasonable remuneration of the said receivers and managers;
- Secondly in or towards payment of all interest;
- h* Thirdly, in or towards payment of all principal monies secured in thereby and
- Fourthly, any surplus shall be paid to the company.

- i* In addition to the said debenture, the 1st respondent had on 11 March 1971, charged its land held under certificate of title no. 14733 for Lot 1558N in the town of Ipoh, Kinta in favour of *Banque De L'Indochine* and the said charge was duly registered under the National Land Code on 27 April 1971. Again on 8 October 1973, the 1st respondent charged two more lots of its lands in Penang in favour of *Banque De L'Indochine* to secure repayment of all

sums of moneys advanced or to be advanced by *Banque De L'Indochine* to the 1st respondent. The charge was duly registered under the National Land Code on 5 November 1973. On 22 December 1980, the 1st respondent further charged seven parcels of its lands in Mukim Batang Padang Perak in favour of *Banque De L'Indochine Et De Suez* to further secure the repayment of all sums of monies advanced or to be advanced by *Banque De L'Indochine Et De Suez* to the 1st respondent. Again the charge was registered under the National Land Code on 7 March 1981.

Amongst the assets and properties of the 1st respondent charged to *Banque De L'Indochine* under the debenture are, *inter alia*, shares registered in the name of the 1st respondent in various companies the particulars of which are set out in Exhibit "RA5" annexed to the affidavit of the 2nd applicant affirmed on 17 October 1989. The 1st respondent is also a full member of the Kuala Lumpur Commodity Exchange, the membership of which is transferable. A copy of the certificate of membership has been annexed as Exhibit "RA8" to the aforesaid affidavit of the 2nd applicant.

By a transfer of debenture dated 1 April 1985 made between *Banque De L'Indochine* (apparently the deponent of the affidavit encl. 2 made a mistake as the transferor *Banque* was *Banque De L'Indochine Et De Suez*) as transferor of the one part and the 1st applicant as transferee of the other part, *Banque De L'Indochine* (again it should be *Banque De L'Indochine Et De Suez*) transferred to the 1st applicant the debenture and all the principal monies and interest secured thereby and the full benefit thereof (see Exhibit 'RA9' annexed to the aforesaid affidavit). All the parcels of land originally charged to *Banque De L'Indochine* by the 1st respondent were also all transferred to the 1st applicant by two transfers of charges which were duly registered on 7 December 1987 and 6 January 1988 respectively (see Exhibits "RA10A", "RA10B" and "RA11" annexed to the aforesaid affidavit). Apparently the 1st respondent failed to make any repayment of the loans granted by the 1st applicant and the 1st applicant in exercise of the rights conferred on it under the debenture now applies to this Court for the orders set out in paragraph one of this judgment.

In opposing the application of the applicants the 1st respondent relied on several grounds in support of its opposition. It is premature for me to set out the grounds relied on by the 1st respondent at this stage simply because in order to be able to comprehend the said grounds it is necessary at least to state the undisputed facts of the case. Suffice it to state here that the several grounds of the 1st respondent are directed to contend that the purported transfer of the debenture to the 1st applicant on 1 April 1985 was illegal and void in law.

The facts that cannot be disputed are as follows.

Banque De L'Indochine which was incorporated in France set up a branch in Kuala Lumpur also called *Banque De L'Indochine* which was duly registered under s. 301(1) of the Companies Ordinance 1940 as a foreign company with a registered office at 44, Pudu Road, (Ground Floor) Kuala Lumpur and operating its banking business under a banking licence issued to it on 15 April 1965. When the Companies Act 1965 came into force *Banque De L'Indochine* was again issued with a Certificate of Registration of Foreign Company pursuant to s. 334(1) of the Companies Act 1965 (hereinafter referred to as 'the 1965 Act' unless otherwise specified) on 23 October 1973 (see Exhibit 'LKH7' of the affidavit of Loh Kok Hu, a director of the 1st respondent affirmed on 16 August 1990 in encl. 9). As stated earlier by a debenture made on 11 March 1971 between the 1st respondent and this *Banque De L'Indochine*, the 1st respondent charged its undertakings, property and assets both present and future by way of security in favour of the said *Banque* to secure payment to the said *Banque* of the money, obligations, and liabilities mentioned in the debenture. The debenture

- a** was duly registered under the 1965 Act (see Exhibit 'LPS2' which was a copy of Form 40 Certificate of Registration of Charge dated 15 March 1971 signed by the Assistant Registrar of Companies annexed to the affidavit of Lee Peng Seng, the manager (marketing) of the 1st applicant in encl. 10). Subsequently under a reconstruction scheme adopted by the said *Banque* head office in France, the banking business hitherto carried on by the said *Banque* in Kuala Lumpur as well as the said head office and all its branches throughout the world
- b** was dissolved on 31 May 1974. The agent of the *Banque De L'Indochine* Kuala Lumpur (hereinafter referred to as 'the original *Banque De L'Indochine*') duly gave notice in Form 91 of the 1965 Act of the dissolution to the Registrar of Companies (the ROC); see Exhibit LKH1 of the affidavit-in-reply of Loh Koh Hu affirmed on 27 February 1990 in encl. 5. On the same date as the dissolution of the original *Banque De L'Indochine*, the banking business of the said *Banque* was transferred to *Societe De L'Indochine (the Societe)* a company incorporated
- c** in France with limited liability which had an office at the same address as the original *Banque De L'Indochine* that is at 44, Jalan Pudu, Kuala Lumpur. In anticipation of the *Societe* taking over the banking business of the original *Banque De L'Indochine* and operating it under the same name, that is, *Banque De L'Indochine* (hereinafter referred to as the new *Banque De L'Indochine*) the said original *Banque* wrote a letter to the Ministry of Trade and Industry on 30 May 1974. For purposes of the judgment I need only to reproduce the following relevant paragraphs of the said letter:
- d**

The said *Banque De L'Indochine* presently has a subsidiary incorporated in France known as **Societe De L'Indochine** which is not registered in Malaysia as a foreign company. A reconstruction of the existing *Banque De L'Indochine* is due to be effected on 31 May 1974 the effect of which will be that the banking business of the existing *Banque De L'Indochine* in all countries will be transferred to the above-mentioned subsidiary *Societe De L'Indochine*.

e Also on 31 May 1974 *Banque De L'Indochine* after it has transferred its banking business to *Societe De L'Indochine* will be automatically dissolved under French law and notice of such dissolution will be given to the Registrar of Companies Malaysia who will be asked to remove the name of the existing *Banque De L'Indochine* from the Registrar of foreign companies pursuant to s. 340(5) of the Malaysian Companies Act 1965.

- f** Also on 31 May 1974, *Societe De L'Indochine* will change its name to "*Banque De L'Indochine*", that is, the same name as the existing banking company and it is desired that the new company under the name of "*Banque De L'Indochine*" be registered with the Registrar of Companies Malaysia as a foreign company. As the name of the new company includes the word "Bank" under the French equivalent (*Banque*) it is necessary to obtain your Ministry's approval to the registration of the name of the new company under the provisions of the *Gazette* notification no. 1484/66 and the purpose of this letter is to seek your approval to such name.

- g** Bank Negara Malaysia has approved of the above reconstruction and has in fact already issued a licence in the name of the new Bank, that is, "*Banque De L'Indochine*" authorising it to carry on banking business under the Banking Act 1973 with effect from 1 June 1974 and in discussion confirmed its approval to the use of the word "*Banque*" in the name of the new company. In discussions with the Registrar of Companies he also confirmed that subject to obtaining the necessary approvals from your Ministry he would accept the name of "*Banque De L'Indochine*" for the registration of the new company in Malaysia as a foreign company.
- h**

As it is necessary for the new company to be registered within one month after it commences business in Malaysia on 1 June 1974 we would appreciate your earliest approval to the name of the new company to enable our client to comply with s. 332 of the Companies Act 1965.

Yours faithfully

i

c.c. Bank Negara Malaysia,
Kuala Lumpur (Attention Mr. Chee ? Yong) (*sic*)
Registrar of Companies, Malaysia
Bangunan Bank Negara
Kuala Lumpur (Attention: The Registrar).

a

(See Exhibit 'LPS8' annexed to encl. 10 - affidavit of Lee Peng Seng).

About a week prior to the writer of the aforesaid letter sending it to the Ministry of Trade & Industry, the Minister of Finance had issued a banking licence which reads as follows:

b

Malaysia

Banking Act 1973

Licence to carry on Banking Business

c

In pursuance to s. 3 of the Banking Act 1973, I, Abdul Razak bin Datuk Hussein, Minister of Finance, do hereby grant to

Banque De L'Indochine

a licence to transact banking business in the Federation with effect from 1 June 1974.

Dated 22 May 1974.

d

(PERB. 0.5005 Vol.c 2)

Signature

(Abdul Razak bin Datuk Hussein)

Minister of Finance,

Malaysia.

(see Exhibit 'LPS6' annexed to encl. 10 - affidavit of Lee Peng Seng).

e

In forwarding the aforesaid banking licence to the said *Banque*, Bank Negara wrote the following letter to the said *Banque*:

Pengurus, 28hb. Mei, 1974

Banque De L'Indochine,

44, Jalan Pudu,

Kuala Lumpur.

Tuan,

f

Banking Licence - Banque De L'Indochine

We forward herewith the licence issued to the Banque De L'Indochine to conduct banking business in Malaysia with effect from 1 June 1974. Kindly return the licence issued to the former Banque De L'Indochine to Bank Negara Malaysia for cancellation.

g

Dengan hormatnya,

(Mohd. Taib bin Abdul Hamid)

Penasihat,

Perkhidmatan Bank.

(See Exhibit 'LPS7' annexed to encl. 10 - affidavit of Lee Peng Seng).

h

In the meantime the 1st respondent executed an agreement on 22 May 1974 (hereinafter referred to as "the 1974 agreement") with the *Societe*. As this agreement plays an important part in the present contest between the parties and is quite short it is useful to set out in full the contents of the agreement which are as follows:

This agreement is made 22 May 1974 between

i

a**Joo Seng Rubber Company Sdn. Bhd.**

(hereinafter called “the customer”) of the one part and *Societe De L’Indochine* incorporated in France with limited liability and having an office in Malaysia at 44 Jalan Pudu, Kuala Lumpur (hereinafter referred to as “*Societe*”) of the other part.

b

Whereas the customer has for some time past up to the date hereof utilised overdraft and other banking facilities granted to him by *Banque De L’Indochine* (hereinafter referred to as “*Banque*”) and as security for such facilities the customer created in favour of *Banque* the security specified in the schedule hereto (hereinafter referred to as “the existing security”).

And Whereas the customer has been advised by **Banque** that under a reconstruction of **Banque** the banking business hitherto carried on by *Banque* in Malaysia and elsewhere is on 31 May 1974 to be transferred to *Societe*.

c

And Whereas on 31 May 1974 *Banque* will be dissolved and *Societe* will change its name to “*Banque De L’Indochine*”.

And Whereas the customer has agreed to transfer his accounts presently operated with *Banque* at its Kuala Lumpur branch to *Societe* with effect from the start of business on 1 June 1974 and the customer is desirous of *Societe* granting to him similar overdraft and other banking facilities as presently enjoyed from *Banque*.

d

Whereby It Is Hereby Agreed between the parties hereto as follows:

e

1. The customer hereby applies to *Societe* and *Societe* hereby agrees to grant to the customer overdraft and other banking facilities of a similar nature and up to the same limit as those previously granted to and enjoyed by the customer from *Banque* at the date hereof on *Societe*’s terms for making such advances and such facilities shall be made available to the customer by *Societe* after 31 May 1974 when the Kuala Lumpur branch of *Banque* becomes a branch of *Societe* having then changed its name to *Banque De L’Indochine* subject always to the rights of *Banque* to call up the moneys advanced by *Banque* to the customer before said 31 May 1974 and to the customer complying with all terms and conditions of the existing security.

f

2. In consideration of *Societe* granting to the customer the facilities referred to in cl. 1 hereof the customer hereby:

(a) agrees to *Societe* taking a transfer from *Banque* of the existing security;

(b) agrees and confirms that the existing security when transferred to *Societe* shall be security to *Societe* for all moneys owing by me on my account or accounts with *Banque* as at the close of business on 31 May 1974 and which will be transferred to my new account or accounts with *Societe* and any further advances which are extended by *Societe* either in its present name or its new name of *Banque De L’Indochine* to the customer.

g

3. The customer undertakes to execute in favour of *Societe* similar security documents as presently held by *Banque* when requested to do so by *Societe*.

4. In this agreement where the context so permits:

(a) words importing the masculine gender including the feminine or neuter genders;

h

(b) words applicable to natural persons include any body of persons company corporation firm or partnership corporate or unincorporate;

(c) words in the singular include the plural and *vice versa*.

5. This agreement shall be binding upon the personal representatives successors in title and assigns of the customer and *Societe*.

i**The Schedule Before Referred To**

<i>Nature of document</i>	<i>Date</i>	<i>Particulars of property secured</i>	<i>Amount secured</i>
Debenture	11.3.1971	See cl. 2 of Debenture	RM8,000,000
Charge	11.3.1971	See Schedule to Charge Presentation No. 1980/71	
Charge	11.3.1971	See Schedule to Charge Presentation No. 315/71	

a

b

In Witness Whereof the parties hereto have hereunto set their hands or affixed their common seals the day and year first before written.

Signed by the customer in the presence of :
) Joo Seng Rubber
) Co. Sdn. Bhd.
) Managing Director.

c

or

The common seal of the customer was hereunto affixed in the presence of :
)
)
)

d

Signed by the Attorney of **Societe De L'Indochine** in the presence of :
)
) Signature
)

Signature
 Advocate and Solicitor,
 Kuala Lumpur.

e

We, **Banque De L'Indochine** hereby consent to the transfer of the existing security to *Societe* upon the terms and conditions specified in the within written agreement.

Banque De L'Indochine
 Signature.

f

In addition the original *Banque De L'Indochine* also executed a transfer of debenture with the *Societe* on 31 May 1974 duly stamped on 15 June 1974 whereby "in consideration of the new *Banque De L'Indochine* taking over all their rights and liabilities specified in the debenture specified in the schedule thereto stamped to secure to a limit of RM6,000,000 and issued by Joo Seng Rubber Company Sdn. Berhad", the original *Banque De L'Indochine* thereby transferred to the *Societe* the debenture and all principal monies and interests secured thereby and the full benefit thereof subject to the conditions which the *Societe* held the same. It was likewise stated in the said transfer that the *Societe* agreed to take the same subject to all conditions affecting or appertaining to the same (see Exhibit "A9" annexed to encl. 6 - affidavit of Lee Peng Seng). To further ensure that all the customers of the original *Banque De L'Indochine* knew about the restructuring of the banking business and the transferring of the said banking business to the *Societe* which would be operating the said business under the same name as the said original *Banque*, the new *Banque De L'Indochine* sent a circular letter dated 25 May 1974 to all the customers of the said original *Banque* informing them of the restructuring and the transferring of the banking business to the new *Banque De L'Indochine* and the dissolving of the original *Banque De L'Indochine*. By that letter every customer was told *inter alia* that if the said new *Banque* had no instruction to

g

h

i

- a* the contrary by 30 May 1974 it would be assumed that the customer agreed to the transfer and continued to continue operating his or her account(s) with the said new *Banque*. There were three passages in that letter that are as can be seen later, important and it is useful to reproduce them:

- b* The effect of the reconstruction will be that the banking business of the existing bank in all countries where banking business is carried on will be transferred to a company known as *Societe De L'Indochine* (hereinafter referred to as "the new Bank"). The new Bank is incorporated in France and will have the same head office the same directors and the same form of constitution as the existing Bank.

- c* On the same day as the new Bank takes over the banking business of the existing Bank the existing Bank will be automatically dissolved under French law. Immediately after the dissolution of the existing Bank the new Bank will change its name to "*Banque De L'Indochine*", that is, the same name as the existing Bank.

The general character and policy of business will remain unchanged and in order to ensure continuity the staff of the existing Bank will continue to look after your business and ensure that you receive the personal attention and understanding of your requirements to which you have been accustomed in the past.

- d* There is no doubt that although the ROC did not issue the Certificate of Registration of Foreign Company to the *Societe* until 1 July 1975 nonetheless in the said certificate (see Exhibit LKH-2 annexed to encl. 8 - affidavit-in-reply of Loke Kok Hu, director of the 1st respondent) it was stated that:

- e* This is to certify that a company called *Societe De L'Indochine* which was formed or incorporated in France did on 29 June 1974 duly comply with the provisions of s. 332(1) of the Companies Act 1965.

Following the issue of the aforementioned certificate, the ROC issued another certificate of change of name of the *Societe* which would henceforth be called '*Banque De L'Indochine*'. The said certificate was issued on 2 July 1975 (see Exhibit 'A6' annexed to encl. 6 - affidavit of Lee Peng Seng).

- f* On 15 November 1975 an agent of the new *Banque De L'Indochine* in Malaysia completed Form 84 which was the form to give particulars of change or alteration relating to a foreign company and sent it to the ROC to apply for a change of name of the new *Banque De L'Indochine* effective from 30 September 1975. Particulars of the change or alteration were as follows:

Re status of the company;

- g* the name of the company was changed from *Banque De L'Indochine* to *Banque De L'Indochine Et De Suez*.

- h* Together with the said Form 84, the said agent also lodged the necessary documents giving full details and particulars of the change and the minutes of the Extraordinary General Meeting of the company (that is, *Banque De L'Indochine Et De Suez* held on 30 September 1975) (see Exhibit A-10A of encl. 6 - affidavit of Lee Peng Seng). On receipt of the said Form 84 the ROC duly issued a certificate of change of name certifying that *Banque De L'Indochine* having changed its name was then to be known as *Banque De L'Indochine Et De Suez*. The said certificate was dated 4 December 1975 (see Exhibit A-10B of encl. 6 - affidavit of Lee Peng Seng). *Banque de L'Indochine Et De Suez* was also issued with a licence to carry on banking business (see Exhibit LKH11 of encl. 9 - affidavit of Loh Kok Hu). The 1st respondent charged seven lots of its land in Mukim Batang Padang to the *Banque de L'Indochine Et De Suez* as security for loans which had been and would be granted to it from time to time.
- i*

The annexure to the charge instrument dated 22 December 1980 made reference to the debenture as the principal instrument under which the charge was made. The charge was registered with the Pemungut Hasil Tanah Negeri Perak on 7 March 1980 (see Exhibit A-11 of encl. 6 - affidavit of Lee Peng Seng). Furthermore the said charge was also registered with the ROC on 30 January 1981 - see Exhibit "LSP9" of encl. 10 - affidavit of Lee Peng Seng.

On 10 December 1982 an agreement (hereinafter referred to as the 1982 agreement) was executed between *Banque de L'Indochine Et De Suez* and the present 1st applicant whereby it was stated in the recitals that the Malaysian French Bank Berhad, as transferee, was incorporated in Malaysia on 3 August 1982 for the purpose of acquiring the undertaking including the assets and liabilities and goodwill of the *Banque de L'Indochine Et De Suez*, as the transferor and that the acquisition of the undertaking by the transferee from the transferor and the terms of such acquisition were approved by Bank Negara Malaysia, the Foreign Investment Committees and the Capital Issues Committee. In the recitals it was also stated that the transfer of the undertaking was deemed to have been effected with effect from 1 October 1982 notwithstanding that the assets and liabilities had not yet been formally transferred. The assets acquired by the transferee as stated in the terms of the agreement included *inter alia* the immovable properties of the transferor, particulars of which were specified in the First Schedule thereof and the securities held by the transferor as at the effective date (that is, 1 October 1982) from customers of the transferor in respect of facilities granted by the transferor to such customers in the normal course of the transferor's business as a licenced bank (see Exhibit 'LSP1' of encl. 10 - affidavit of Lee Peng Seng). The 1st applicant was also issued with a licence to carry out banking business by the Minister of Finance on 1 October 1982 (see Exhibit 'LSP10' of encl. 10 - affidavit of Lee Peng Seng). The 1st respondent was not only aware of the transfer of the assets and liabilities of *Banque de L'Indochine Et De Suez* to the 1st applicant but it also agreed to transfer *inter alia* the debenture to the 1st applicant as security for advances made to it by the 1st applicant. The 1st respondent further agreed that the several charges of its lands and the lien on shares would also be transferred to the 1st applicant (see Exhibit A13 of encl. 6 - affidavit of Lee Peng Seng).

Finally in view of the grounds raised by the 1st respondent in opposing the present application of the applicants, the 1st applicant through its Pengurus Besar Urusan Bank wrote to Bank Negara on 11 September 1990 to enquire about the banking licences issued to *Banque De L'Indochine*, *Banque De L'Indochine Et De Suez* and the Malaysian French Bank. In response the Pengurus Jabatan Pengawalan Bank of Bank Negara wrote to the 1st applicant the following letter dated 28 September 1990:

Banking Licenses

We refer to your letter of 11 September 1990 on the above. Further to our letter 11 August 1990 we would confirm that the banking licence issued by the Minister of Finance in the name of ***Banque De L'Indochine*** on 15 April 1965 pursuant to s. 3 of the Banking Ordinance 1958 was surrendered upon a new licence being issued under the same name (*Banque De L'Indochine*) with effect from 1 June 1974. We wish to clarify that the issue of the new licence under the name of *Banque De L'Indochine* in 1 June 1974 was because the banking business of the "old" *Banque De L'Indochine* was transferred to *Societe De L'Indochine* on 31 May 1974 which on the same day changed its name to *Banque De L'Indochine*, thereby necessitating the issue of the new licence to *Banque De L'Indochine* on 1 June 1974. This licence was valid until it was surrendered on 30 September 1975, that is, when the bank changed its name to *Banque De L'Indochine Et De Suez*. From our record, we found that no licence has been issued in the name of *Societe De L'Indochine*.

a We would therefore reiterate that *Banque De L'Indochine* (old as well as new as explained above), *Banque De L'Indochine Et De Suez* and Malaysian French Bank Berhad had and has at all times to the present day valid banking licences under the provision.

Yang benar,
Signature.
(Abdul Murad Khalid)

b Pengurus,
Jabatan Pengawalan Bank.

(see Exhibit "LPS1" of encl. 12 - affidavit of Lee Peng Seng).

In opposing the application of the applicants for the orders mentioned in para. 1 of this judgment the 1st respondent in its affidavits and also through its Counsel contended that firstly the transfer of the debenture dated 31 May 1974 from the original *Banque De L'Indochine* to the *Societe* was null and void for the following reasons.

- c**
- (i) On 31 May 1974 the *Societe* was not in possession of a valid licence but the "replacement" licence issued to the original *Banque De L'Indochine* and
 - (ii) Any licence issued by the Minister through Bank Negara pursuant to s. 24 of the Banking Act 1973 (Act 102) is an invalid licence.

d I can say quite categorically that I totally disagree with the contention of the 1st respondent for the following reasons.

e It may be recalled that the head office of the original *Banque De L'Indochine* was carrying out a restructuring scheme whereby all its banking branches, throughout the world were to be dissolved as from 31 May 1974 and new branches were to be set up which would be taken over by the *Societe*. In anticipation of this reconstruction scheme an application must have been made to Bank Negara for a banking licence to be issued to the new *Banque De L'Indochine* Kuala Lumpur pursuant to s. 3(2) of the Banking Act 1973. Bearing in mind that a banking licence was issued by the Minister of Finance to a corporation known as *Banque De L'Indochine* on 22 May 1974 which licence was to come into effect on 1 June 1974, it is highly ridiculous for the 1st respondent to suggest that the *Societe* did not apply for a banking licence under the said s. 3(2) and that it was carrying on banking business under the "replacement" licence issued to the old *Banque De L'Indochine*. There is no reason whatsoever for Bank Negara to recommend to the Minister of Finance who likewise had no reason whatsoever to issue a 'replacement' banking licence to the old *Banque De L'Indochine* when they were fully aware of the fact that the said old *Banque* was to be dissolved on 31 May 1974. It is too ludicrous even to think that Bank Negara and the Minister of Finance would have issued a replacement banking licence to the old *Banque De L'Indochine* which body would cease to exist as from 31 May 1974. The one and only logical conclusion that one can arrive at is that the banking licence issued on 22 May 1974 was issued to the new *Banque De L'Indochine* which was to be owned and managed by the *Societe*. This is made clear by the letter written by Bank Negara dated 28 May 1974 in which it requested the old *Banque De L'Indochine* to return its licence issued in 1965 for cancellation and another letter written by Bank Negara on 28 September 1990 which said *inter alia* that and I quote:

h

We wish to clarify that the issue of the new licence under the name of *Banque De L'Indochine* in 1 June 1974 was because the banking business of the 'old' *Banque De L'Indochine* was transferred to *Societe De L'Indochine* on 31 May 1974 which on the same day changed its name to *Banque De L'Indochine* thereby necessitating the issue of the new licence to *Banque De L'Indochine* on 1 June 1974.

i

It was then suggested by the 1st respondent that although in both *Gazette* notifications PU(B)112 of 7 March 1974 and PU(B)110 of 31 March 1975 publishing the names of banks that were licenced under the Banking Act 1973, and the name of *Banque De L'Indochine* appeared therein, it was however stated that the date on which the bank was licenced was 15 April 1965. This, so said the 1st respondent, showed firstly that the banking licence issued by the Minister of Finance on 22 May 1974 was in fact a "replacement" licence issued to the old *Banque De L'Indochine*. In other words it was an extension of its 1965 licence. To my mind it proves nothing of that sort because the issue of a replacement or extension of the 1965 licence would be an exercise in futility for the reasons as stated earlier. It is my considered opinion that there was a mistake in not publishing the date of the issue of the licence to the new *Banque De L'Indochine* and it must have occurred in this way. Bearing in mind that in spite of the request made to the old *Banque De L'Indochine* to return its old licence for cancellation, it failed to do so. The 1965 licence issued to it was still on record. Now the 1974 licence was issued to a bank that carried the same name. It was therefore understandable that the officer of Bank Negara who caused the publications to be made mistakenly cited the 1965 licence instead of the 1974 licence. It was then contended by the 1st respondent that in any case since the 1974 licence of the new *Banque De L'Indochine* was not published at all that licence must be held to be null and void for it was mandatory that pursuant to s. 13 of the Banking Act 1973 that the Central Bank, must cause to be published in the *Gazette* in each year a list of all banks to which licences had been issued. I cannot agree with such a contention. The publication of the list as provided in the said s.13 is not and I repeat not a condition precedent to the issue of a banking licence under s.3 of the Banking Act 1973 - it is only a means to let the public know the names of the bank to whom licences have been issued. Furthermore there is no penalty imposed by s. 13 to penalise any one who failed to cause the list to be published. In support of my proposition I would refer to Bindra's *Interpretation of Statutes* 7th Edn., p. 654 where it is stated:

On the other hand, where the conditions are imposed merely for administrative purposes and no specific penalty is imposed for breach or violation of such conditions, agreements in breach of them are valid. It is clear law that an act forbidden in public interests, cannot be made lawful for paying penalty in violation, whereas an act which is lawful in itself cannot become unlawful merely because some collateral requirement imposed for reasons of administrative convenience has not been fulfilled.

It is also to be noted that banks have no control over those who are enjoined by the said s. 13 to carry out the publication provided therein. Any omission or error in the publication will cause injustice not to the general public but only to the bank concerned. I am therefore of the view that the said s. 13 is directory and not mandatory. If an authority is necessary I would refer to *State of Punjab v. Satya Pal* AIR [1969] SC 903 at 916 where it is stated:

In those cases where strict compliance is indicated to be a condition precedent to the validity of the act itself the neglect to perform it as indicated is fatal. But in cases where although a public duty is imposed and the manner of performance is also indicated in imperative language, the provision is usually regarded as merely directory when general injustice or inconvenience results to others and they have no control over those exercising the duty.

In further support of its contention the 1st respondent raised a number of allegations which may be summarised thus.

In the first place the 1st respondent alleged that prior to 22 May 1974 only the *Societe* was legally in existence. The new *Banque De L'Indochine* only came into existence after 31 May 1974. Therefore, so said the 1st respondent, the *Banque De L'Indochine* named in the 1974 licence was meant for the original *Banque De L'Indochine* for if it were otherwise the name

- a* of the *Societe* would have appeared in the 1974 licence. In support of the 1st respondent's allegation Counsel for the 1st respondent drew my attention to the fact that in sending the 1974 licence to *Banque De L'Indochine*, Bank Negara addressed it to the Pengurus, *Banque De L'Indochine*, 44, Jalan Pudu, Kuala Lumpur and not to the *Societe*. This, said Counsel, only showed that the 1974 licence was in fact a replacement licence to the old *Banque De L'Indochine* and not to the *Societe*. In further support of the 1st respondent's allegation,
- b* Counsel drew my attention to the letter dated 28 September 1990 (see Exhibit 'LP1S' annexed to the further affidavit-in-reply of Lee Peng Seng encl. 14) written by the Pengurus Jabatan Pengawalan Bank of Bank Negara in which it was stated *inter alia* that and I quote:

From the record, we found no licence had been issued in the name of *Societe De L'Indochine*.

- Counsel also drew my attention to another letter dated 18 August 1990 written by another officer of Bank Negara which stated, *inter alia*, that and I quote:
- c*

The banking licence issued by the Minister of Finance in the name of *Banque De L'Indochine* on 15 April 1965 pursuant to s. 3 of the Banking Ordinance 1958 was valid until it was surrendered on September 1976 (that is when the bank changed its name to *Banque De L'Indochine Et De Suez* (or *Bank Indosuez*));

- d* Pausing here for a moment to consider the aforesaid allegations of the 1st respondent, I can say at once that all the said allegations, (save one of the allegations with which I will deal presently) are so frivolous and trivial that they can all be answered in three sentences. Bearing in mind that the old *Banque De L'Indochine* had informed Bank Negara that the said *Banque* would be dissolved on 31 May 1974, that is banking business would be taken over by the *Societe* and that the *Societe* would change its name to the new *Banque De L'Indochine* and operate the banking business under this name, it is (at the risk of repeating myself) absurd
- e* to suggest that the banking licence issued by the Minister of Finance on 22 May 1974 was meant to be a replacement or an extension of the 1965 banking licence of the original *Banque De L'Indochine* which would cease to exist as at 31 May 1974 and not for the *Societe* which would change its name to *Banque De L'Indochine* and would operate the banking business under that name as at 1 June 1974. In the circumstances it cannot be denied that the 1974
- f* banking licence was sent to the Pengurus of the new *Banque De L'Indochine* at No. 44, Jalan Pudu, Kuala Lumpur which was the address of the said new *Banque* although it was also at that same address that the original *Banque* was operating its business before its dissolution. As the *Societe* had informed Bank Negara that it would be changing its name to the new *Banque De L'Indochine* and operate its banking business under that name, Bank Negara quite rightly said that "no licence had been issued in the name of *Societe De L'Indochine*" because the *Societe* would cease to exist after 31 May 1974 and it would
- g* operate its banking business under the new name of *Banque De L'Indochine*. All the allegations of the 1st respondent and the contention of its Counsel are best said and be rejected. The only allegation that is worthy of some consideration arose from the passage of the letter dated 18 August 1990 written by Bank Negara which I have reproduced earlier. Although I say that the allegation is worthy of some consideration, it can easily be resolved by a short explanation. Upon issue of the 1974 banking licence to the new *Banque De*
- h* *L'Indochine* the original *Banque De L'Indochine* was asked to return its 1965 licence for cancellation. But it never did and it was only on 30 September 1976 that the 1965 licence was surrendered to Bank Negara. Based on the surrender of the 1965 licence on 30 September 1976 and what the writer of the letter of 18 August 1990 had said in that letter the 1st respondent and its Counsel thereupon urged me to hold that it was the original *Banque De L'Indochine* that changed its name to *Banque De L'Indochine Et De Suez* ("*Banque Indosuez*") upon the surrendering of its 1965 licence. Such a proposition of the 1st respondent
- i*

and its Counsel is totally unacceptable simply because again at the risk of repeating myself, the original *Banque De L'Indochine* had ceased to exist since 31 May 1974 when it was dissolved. However as the 1965 licence was not surrendered to Bank Negara until 30 September 1976, that licence as far as Bank Negara was concerned would remain in its record as it had not yet been cancelled. It is for this reason that the writer of Bank Negara by letter of 18 August 1990 said that the 1965 licence "was valid until it was surrendered on 30 September 1976 (that is, when the bank changed its name etc.)". When the writer of the Bank Negara letter said the bank changed its name, he was referring to the new *Banque De L'Indochine* and not the original *Banque De L'Indochine* which no longer existed. That being the case the only conclusion that one can logically arrive at is that the new *Banque De L'Indochine* changed its name to Bank Indosuez on 30 September 1974 and I do so hold.

Secondly the 1st respondent and its Counsel contended that the *Societe* had failed to make an application to Bank Negara pursuant to subsection (2) of s. 3 of the Banking Act 1973 for a banking licence which reads as follows:

- (2) A corporation which desires authority to carry on banking business in the Federation shall apply in writing through the Central Bank to the Minister for a licence under this section and shall supply:
 - (a) a copy of the memorandum of association and articles of association or other instrument under which the corporation is incorporated, duly verified by a statutory declaration made by a senior officer of the corporation;
 - (b) a copy of the latest audited balance sheet of the corporation; and
 - (c) such other information as may be called upon by the Minister.

Therefore, so said Counsel, the Minister of Finance was wrong in law to issue the 1974 licence to the new *Banque De L'Indochine*. It is to be noted that Counsel also drew my attention to the letter dated 30 May 1974 written by the original *Banque De L'Indochine* through its solicitors to the Minister of Trade and Industry (see Exhibit "LPS-8" of Lee Peng Seng's affidavit encl. 10) which I have reproduced earlier, and he asserted as that was the only letter written by the said original *Banque* which was carbon copied to Bank Negara therefore it must follow that the *Societe* had not made an application pursuant to the said subsection (2) of s. 3. I cannot agree with the inference drawn by the Counsel. To my mind it is highly improbable that Bank Negara would recommend to the Minister of Finance to issue a banking licence to the new *Banque De L'Indochine* when the *Societe* had not made a proper application. In support of my proposition I notice in the first place that Bank Negara had by a letter dated 28 September 1970 (see Exhibit "LPS1" of encl. 12 affidavit of Lee Peng Seng) categorically confirmed *inter alia* that the new *Banque De L'Indochine* as well as *Banque Indosuez* and the Malaysian French Bank **had and has at all times** valid licences apparently under the provisions of s. 3 of the Banking Act 1973. Would Bank Negara make such an unqualified statement had there been a failure on the part of any of the banks in question to properly apply for a banking licence? Needless to say the answer must be an unqualified no. In the second place as one may recall the *Societe* took over the banking business of the original *Banque De L'Indochine* under a reconstruction scheme for which approval of the Minister of Finance must be obtained pursuant to s. 24 of the Banking Act 1973. The said Minister would only give his approval upon the recommendation of Bank Negara. To get the approval the *Societe* would certainly have to furnish Bank Negara with all necessary documents which must include the instrument under which it was incorporated, latest audit account and balance sheet and such other information as the Minister might require. That being the case the *Societe* had complied with the provisions of subsection (2)

- a* of s. 3 of the Banking Act not once but twice. In the third place I notice that in the Certificate of Registration of Foreign Company issued by the ROC to the *Societe* it was stated that the *Societe* had duly complied with the provisions of s. 332(1) of the Companies Act 1965. Now under s. 332(1) of the Companies Act 1965 the *Societe* had not only to submit a certified copy of the certificate of its incorporation but many more documents as well as a statutory declaration. Bearing in mind that the *Societe* applied for registration on June 1974 and was
- b* able to furnish the ROC with all the necessary documents as stipulated in the said s. 332(1), it is highly incredible that in obtaining a banking licence which was more important it could have failed to comply with s. 3(2) of the Banking Act 1973 where it had only to furnish Bank Negara with just two documents namely a copy of the instrument under which it was incorporated and a copy of the latest audited balance sheet. It was not required to submit any other documents or information until the Minister requested for such other documents or
- c* information. At any rate under the circumstances of the case, it warrants the application of the presumptions of *omnia praesumuntur legitima facta donec probetur in contrarium* (all things are presumed to have been legitimately done until the contrary is proved) and also of *ex diuturnitate temporis omnia praesumuntur esse rite et solenniter acta* (from lapse of time all things are presumed to have been done rightly or regularly). It is therefore my finding that the *Societe* had fully complied with s. 3(2) and s. 24 of the Banking Act 1973 and the
- d* banking licence issued to it under its new name of *Banque De L'Indochine* was fully valid.

A third line of attack mounted by Counsel of the 1st respondent was:

- (a) that the memorandum and articles of association of the *Societe* did not permit the *Societe* to do banking business;
- e* (b) that the *Societe's* memorandum and articles of association was only changed at its Extraordinary General Meeting (EGM) held in Paris on 27 May 1974 and even then the change was subject to the approval of the members of the original *Banque De L'Indochine* to be held on 31 May 1974.

For the above reasons the *Societe* could not have complied with s. 3(2), (3) and (4) of the Banking Act 1973.

- f* Again I cannot agree. The articles of association of the *Societe* produced by the respondent and annexed to the further affidavit of Loh Kok Hu encl. 9 shows clearly that the object of the *Societe* was and I quote:

- (i) the direct or indirect participation by any appropriate means in **all types of undertakings**: agriculture, commercial, industrial, **financial** or real estate.
- (iii) in general, any management, **lending** or investment operation.
- g* (iv) and more generally speaking, any **operations whatsoever directly or indirectly relating to this object and likely to facilitate their development and realization**.
(Emphasis is mine).

- To my mind such a wide object must include banking business. It might well be that the articles of association of the *Societe* was changed at its EGM on 27 May 1974 but the *Societe*
- h* most probably did so *ex abundanti cautela* and merely to put its object in greater clarity. At any rate the purported copy of the minutes of the *Societe's* EGM held on 27 May 1974 is to my mind inadmissible as it is only a photostat copy and it was translated from French into English without certifying that the translator was an authorised translator. Furthermore the minutes was not even signed by the chairman and the secretary - the spaces for their respective signatures were left blank. In addition the 1st respondent also produced a copy
- i* of the purported registration of the *Banque De L'Indochine* in Paris (see Exhibit 'LKH15'

annexed to encl. 16) and claimed that the registration was only carried out on 12 July 1974. Counsel therefore argued that the *Societe* could not have complied with s. 3(2)(a) of the Banking Act as the new *Banque De L'Indochine* had not been registered on 31 May 1974. Upon a closer scrutiny of the said registration document I notice that it was stated therein "Registration date: 26 November 1973" indicating that the said new *Banque* was registered in Paris on that date in anticipation of the dissolution of the old *Banque De L'Indochine* on 31 May 1974. All the contentions of the Counsel are to my mind hopelessly unsound.

a

b

The final line of attack of Counsel of the 1st respondent was that since the ROC did not register the change of name of the *Societe* to the new *Banque De L'Indochine* until 2 July 1975 the Minister in issuing the bank licence to the said *Banque* on 22 May 1974 was in violation of s. 22(1) and (2) of Companies Act 1965 which reads:

(1) Except with the consent of the Minister, a company shall not be registered by a name that, in the opinion of the Registrar, is undesirable or is a name, or a name of a kind, that the Minister has directed the Registrar not to accept for registration.

c

(2) The Minister shall cause a direction given by him under subsection (1) to be published in the *Gazette*.

It was also contended that in issuing the said banking licence the Minister of Finance violated the provisions of the *Gazette* notification no. 1484 of 14 April 1966 which empowered only the then Minister of Commerce and Trade to direct the ROC not to register *inter alia* any company that carried with it the name bearing the words 'Bank', 'Banker', etc. without the approval of the said Minister. In raising such a contention it appeared to me that Counsel was under a misapprehension that until and unless the Minister of Commerce and Trade had given his approval, the *Societe* could not carry on banking business. If that be the basis of his contention he is wrong simply because s. 22(1) and (2) of the Companies Act 1965 and *Gazette* notification no. 1484 of 1966 merely empowered the Minister of Commerce and Trade to disallow the ROC to register a company having the name bearing the words "Bank", "Banker" etc. The two subsections and the *Gazette* notification did not empower the said Minister to forbid any corporation which did not have a banking licence to use the word bank and to carry on banking business. The power to do so is conferred on the Minister of Finance pursuant to s. 9(1) of the Banking Act 1973 and I need only to cite the relevant provisions of that section:

d

e

f

(1) Except with the consent in writing of the Minister:

(a) a person or body of persons not being a licensed bank shall not assume or use in relation to the business or any part of the business carried on by the person or body of persons the word "bank" or any of its derivatives or any word indicating the carrying on of banking business, either in National Language or in English or in any other language.

g

In issuing the banking licence bearing the name of the new *Banque De L'Indochine* to the *Societe* it is clear the prohibition under s. 9(1)(a) would no longer apply. That being so the Minister of Finance had not in any way violated any provisions of the Companies Act 1965 or the Banking Act 1973 for he had the power under s. 3(1) of the latter Act to issue a banking licence to the *Societe* to carry out banking business.

h

As I have found that the *Societe* had been issued with a valid banking licence to carry out banking business under the name of the new *Banque De L'Indochine*, the 1st respondent cannot now be heard to say that the debenture created by it in favour of the original *Banque De L'Indochine* had not been properly transferred to the new *Banque De L'Indochine*. The 1st respondent at any rate is estopped from raising the issue particularly since he had entered

i

- a* into an agreement with the *Societe* to transfer the debenture to the said *Banque* and furthermore it continued to deal with the new *Banque De L'Indochine* to get loans from the said *Banque* on the strength of the debenture. If an authority is necessary I would refer to the case of *Amalgamated Property Co. v. Texas Bank* [1981] 2 WLR 554, which case was brought to my attention by Counsel for the applicants.
- b* Turning to the incorporation of *Banque De L'Indochine Et De Suez* (hereinafter referred to as "*Banque Indosuez*"), the 1st respondent and its Counsel again firstly contended that as *Banque Indosuez* having failed to comply with s. 3(2) of the Banking Act 1973, the banking licence issued to it on 1 October 1975 was null and void. To obviate repeating myself, I need only to say that the reasons as stated earlier in my rejection of the 1st respondent's contention that the banking licence issued to the *Societe* was invalid apply *mutatis mutandis* in my rejection of the 1st respondent's contention against the banking licence issued to
- c* *Banque Indosuez*. Moreover it was through the change of name on the part of the new *Banque De L'Indochine* to *Banque Indosuez* that the latter *Banque* was created. There was no change of the constitution or the financial set-up of *Banque Indosuez* in the process of the alteration of name. Hence the entity of both *Banque* was the same and s. 24 of the Banking Act 1973 would not apply. Secondly it was also contended that as *Banque Indosuez* had surrendered its banking licence on 1 October 1982 it must cease to carry on banking
- d* business. Counsel of the 1st respondent therefore went on to argue that from 1 October 1982 till 1 April 1985 (a period of 30 months) *Banque Indosuez* was holding the banking securities of its customers without a banking licence while its associate company the Malaysian French Bank Bhd. was doing business with the same customers. Under the circumstances it was argued that *Banque Indosuez* was doing banking business by proxy! Counsel relied on the case of *Koh Kim Chai v. Asia Commercial Banking Corporation Ltd.* [1984] 1 CLJ (Rep) 18 to support his contention. That Privy Council case is of no help to the
- e* 1st respondent. Indeed it was held in that case that "even if the security was taken in Malaysia, that was not contrary to s. 3(1) of the Banking Act 1973." In other words the Law Lords of the Privy Council implicitly held that the taking of security by itself does not amount to carrying on "banking business" within the definition of banking business in s. 2 of the Banking Act 1973. In the present case *Banque Indosuez* did not even take any security on
- f* or after it had surrendered its banking licence - it merely retained the securities of its customers (including the debenture created by the 1st respondent) in anticipation of transferring them to the Malaysian French Bank Bhd. To say that the *Banque Indosuez* was doing banking business by proxy through the Malaysian French Bank Bhd. is preposterous for the Malaysian French Bank Bhd. had and still has a valid banking licence and it was carrying out banking business for its own benefits. The fact that the 1st respondent was dealing with the said bank and taking loans from it on the strength of the debenture could not be construed as if the said bank was merely a vehicle for the *Banque Indosuez* to carry on banking business simply because the 1st respondent had on its own volition subsequently entered into an agreement with the said bank on 1 April 1985 (see Exhibit 'A-13' annexed to encl. 6 - affidavit of Lee Peng Seng) whereby it was agreed that the Malaysian French Bank Bhd. was to take a transfer from *Banque Indosuez* of *inter alia* the existing security of the
- h* 1st respondent comprising of the debenture of 11 March 1971 and certain charges of the 1st respondent's lands. Under the circumstances the second contention of the 1st respondent must also be rejected.
- Turning to the establishment of the 1st applicant (hereinafter referred to as "MFBB" abbreviation for Malaysian French Bank Bhd. unless otherwise specified) as a bank to carry
- i* out banking business, Counsel for the 1st respondent contended that since the intention of

the creation of MFBB was to take over the assets and liabilities of *Banque Indosuez*, it was incumbent on MFBB to produce evidence that it had entered into an agreement with the latter *Banque* and also obtained all the essential prerequisites such as FIC and CIC approval before 1 October 1982, the date MFBB commenced banking business before it could meet the requirements of s. 3(2)(a), (b), (c) and subsection (3) and (4) of s. 3 of the Banking Act 1973. It was also incumbent on Bank Negara and the Minister of Finance to ensure that the aforementioned acts had been carried out before they could consider and process an application for a banking licence made by MFBB. In the instant case, so said Counsel, MFBB had jumped the gun and put the cart before the horse, by obtaining a banking licence and commencing banking business on 1 October 1982 when only on 10 December 1982 did it execute an agreement with *Banque Indosuez* - a lapse of 70 days. Hence MFBB was doing banking business on 1 October 1982 with all the customers of *Banque Indosuez* without a valid licence and legal capacity. It must follow therefore that MFBB could not have legally obtained a transfer of the debenture because of the above illegality, and likewise the amount owing by Joo Seng Rubber Co. Sdn. Bhd. (the 1st respondent) was void and unrecoverable because of the illegality. To my mind the line of argument of Counsel is only full of sound and fury signifying nothing. I say so because in the first place there is no provision in the Banking Act to prohibit any corporation to apply for a banking licence. Whether it would succeed in getting the licence is quite a different matter. Hence there is nothing wrong for MFBB to apply for a licence in October 1982. The agreement to take over the assets and liabilities of *Banque De L'Indochine Et De Suez* was a private arrangement between the said *Banque* and MFBB. The fact that the said agreement did not come into existence until 10 December 1982 has nothing to do with the application of MFBB's application for a banking licence when the agreement was a matter *inter se* MFBB and the *Banque Indosuez* only. It is true that the purpose of establishment of MFBB was to take over the banking business of *Banque Indosuez* but that could not prevent MFBB to apply for a banking licence on its own rights and, if its application was successful, to carry out banking business on its own rights pending the finalisation of the taking over agreement with *Banque Indosuez*. In the second place the Minister of Finance had been given full power to issue or reject an application for a licence. There were only three matters under the Banking Act 1973 which the Minister of Finance had to observe in dealing with an application for a licence namely (i) the applicant must have capital funds unimpaired by losses or otherwise of not less than RM2 million pursuant to s. 5 of the said Act, (ii) the applicant must not be owned or controlled by a foreign government pursuant to s. 6 of the said Act and (iii) the applicant was in a position to operate the banking business in compliance with the provisions of the said Act or the regulations made thereunder. As there is no evidence to show that the MFBB had infringed the provisions of ss. 5 and 6 of the Act or that it was incapable of operating the bank in compliance with the provisions of the Act and the regulations made thereunder, it is not within the province of the 1st respondent to question the exercise of the discretion of the Minister of Finance in issuing the banking licence to MFBB. The banking licence issued to MFBB was and still is a valid licence as confirmed by the letter of Bank Negara dated 28 September 1990 which I have reproduced earlier.

As regards to the capacity of MFBB to deal with the customers of the *Banque Indosuez*, one must bear in mind that MFBB was at all material times operating a bank which is fully licenced to do so. As a bank it could do business with anyone more so with the customers of the *Banque Indosuez* which had since ceased to carry on banking business. The 1st respondent cannot now complain that MFBB at the material time had no legal capacity to do banking business with it or that MFBB had no right to accept the transfer of the debenture created by it since it was the 1st respondent who on its own volition applied for and accepted

a

b

c

d

e

f

g

h

i

- a** loans from MFBB on the strength of the agreement executed between the 1st respondent and MFBB on 1 April 1985 (see Exhibit A-13 annexed to encl. 6 - affidavit of Lee Peng Seng). Clause 2 of the said agreement is important as it provides:

In consideration of MFBB granting and extending to the customer the facilities referred to in cl. 1 hereof the customer hereby:

- b** (a) agrees to MFBB taking a transfer from *Banque* of the existing security;
- (b) agrees and confirms that the existing security when transferred to MFBB shall be security to MFBB:
- (i) for all moneys owing by the customer on his account or accounts with *Banque* on the closing date and transferred to the customer's new account or accounts with MFBB as of the effective date;
- c** (ii) further advances made on the customer's account or accounts with MFBB from the effective date to the date hereof and intended to be secured by the existing security;
- (iii) further advances which may be advanced by MFBB to the customer on his account or accounts with MFBB after the date hereof and intended to be secured by the existing security.

- d** The security mentioned in cl. 2 included the debenture of 11 March 1971 and the several charges of lands of the 1st respondent to the new *Banque De L'Indochine* as well as to *Banque Indosuez*. Furthermore in executing the agreement between *Banque Indosuez* and MFBB on 10 December 1982 whereby *Banque Indosuez* transferred all its assets and liabilities to MFBB it was made with retrospective effect, that is, with effect from 1 October 1982. Under the circumstances I am not prepared to accept the aforesaid contentions of Counsel
- e** concerning the validity of the banking licence issued to MFBB and its legal capacity to do banking business with the customers of *Banque Indosuez*. I further hold that the debenture of the 1st respondent was properly and validly transferred to MFBB and the loans granted by MFBB to the 1st respondent is certainly recoverable by MFBB.

- f** Finally it is important to note that in an action instituted by MFBB in the Commercial Division of the Kuala Lumpur High Court Case D1-23-504-88 against the 1st respondent and 5 others, judgment had been obtained against the 1st respondent and the 4th defendant who were directed to pay MFBB the sum of RM10,130,349.38 with interest and another sum of RM960,000. This judgment precluded the 1st respondent from alleging that the loans taken by him from MFBB is not recoverable.

- g** For the above reasons, I hold that the appointment of receivers and managers for the 1st respondent company is perfectly legitimate and legal by virtue of the debenture created by the 1st respondent on 11 March 1971 and which had been transferred to MFBB. I also grant an order in terms of the application of the 1st applicant namely Malaysian French Bank Berhad, made by way of this originating summons. The 1st respondent is ordered to pay the costs of the proceedings.

- h**

Also found at [1991] 3 CLJ 2528

- i**